

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
AT MARTINSBURG**

DIANNA WITTENBERG,)
)
)
Plaintiff,)
)
v.)
)
) Civil Action No. 3:10-CV-00058-JPB
FIRST INDEPENDENT MORTGAGE)
COMPANY, et al.,)
)
Defendants.)
)

WELLS FARGO'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

NOW COMES Wells Fargo Home Mortgage, Inc., a division of Wells Fargo Bank, N.A. ("Wells"), by and through the undersigned counsel and pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and Rule 7.02 of the Local Rule of Civil Procedure, and respectfully moves this Court for an Order dismissing Plaintiff's Amended Complaint as to Wells (the "Motion"). The grounds for this Motion are the Amended Complaint fails to state a claim upon which relief can be granted, and as a matter of law, all of Plaintiff's claims should be dismissed as follows:

1. Count I of the Amended Complaint should be dismissed for the following reasons:
 - a. Plaintiff has no private right of action under RESPA; and
 - b. The Amended Complaint fails to state a claim upon which relief may be granted.
2. Count II of the Amended Complaint should be dismissed because Plaintiff's TILA claims are time-barred by the applicable statutes of limitations.

3. Count III of the Amended Complaint should be dismissed for the following reasons:

- a. The allegations underlying Plaintiff's conspiracy claim are preempted by federal law; and
- b. The Amended Complaint fails to state a claim upon which relief can be granted.

4. Count IV of the Amended Complaint should be dismissed for the following reasons:

- a. Plaintiff has no private right of action under the Home Affordable Modification Program;
- b. Wells Fargo is not required to offer Plaintiff a permanent loan modification;
- c. Plaintiff is not an intended third-party beneficiary of the Servicer Participation Agreement or any Pooling and Servicing Agreement; and
- d. The Amended Complaint fails to state a claim upon which relief may be granted; and
- e. Breach of the duty of good faith and fair dealing is not a stand-alone cause of action in West Virginia.

5. Count V of the Amended Complaint should be dismissed for the following reasons:

- a. The Amended Complaint fails to state a claim upon which relief can be granted; and
- b. Plaintiff's claim for unjust enrichment is preempted by federal law.

6. Count VI of the Amended Complaint should be dismissed because it fails to state a claim upon which relief can be granted.

7. Count VII of the Amended Complaint should be dismissed for the following reasons:

- a. Wells Fargo does not owe a fiduciary duty to Plaintiff; and
- b. Plaintiff's claim is preempted by federal law.

8. Count VIII of the Amended Complaint should be dismissed for the following reasons:

- a. The Amended Complaint fails to state a claim upon which relief may be granted; and
- b. Plaintiff's negligence claim is preempted by federal law.

9. Count IX of the Amended Complaint should be dismissed for the following reasons:

- a. Plaintiff's claims that Wells violated West Virginia law are preempted by federal law; and
- b. The Amended Complaint fails to state a claim upon which relief may be granted.

10. Count X of the Amended Complaint should be dismissed because it fails to state a claim upon which relief can be granted.

11. Count XI of the Amended Complaint should be dismissed for the following reasons:

- a. Plaintiff's claims that Wells violated West Virginia law are preempted by federal law; and

b. The Amended Complaint fails to state a claim upon which relief may be granted.

12. Count XII of the Amended Complaint should be dismissed for the following reasons:

- a. The Amended Complaint fails to state a claim upon which relief may be granted; and
- b. Plaintiff's slander of title claim is preempted by federal law.

13. Count XIII of the Complaint should be dismissed because it fails to state a claim upon which relief may be granted.

14. The specific arguments and authorities in support of this Motion are set forth in the accompanying Memorandum of Law in Support of Motion to Dismiss Plaintiff's Amended Complaint.

WHEREFORE, Wells respectfully prays that this Court dismiss the Amended Complaint and allow it such other and further relief as this Court deems just and proper.

This the 14th day of February 2011.

WELLS FARGO BANK, N.A.

By its Attorneys,

/s/ Jeremy C. Hodges

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certified that the foregoing "**Motion to Dismiss Plaintiff's Amended Complaint**" was filed with the court through the ECF system and copies of the above will be sent electronically to the registered participants as identified on the notice of electronic filing (NEF) and paper copies of the entire document will be sent to those indicated below on the 14th day of February, 2011.

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